

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

IVAN LEE MATTHEWS, II,

Case No.: 3:19-cv-00217-MMD -WGC

Plaintiff

Report & Recommendation of United States Magistrate Judge

V.

Re: ECF No. 21

WILLIAM GITTERE, et. al.,

Defendants

This Report and Recommendation is made to the Honorable Miranda M. Du, Chief States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

Before the court is Defendants' Motion for Summary Judgment. (ECF Nos. 21, 21-1 to 21-4, errata with authenticating declarations at ECF Nos. 24-1 to 24-2.) Plaintiff did not file a response.¹

After a thorough review, it is recommended that Defendants' motion be granted.

I. BACKGROUND

Plaintiff is an inmate in the custody of the Nevada Department of Corrections (NDOC), proceeding pro se with this action pursuant to 42 U.S.C. § 1983. (Am. Compl., ECF No. 11.) The

¹ When Plaintiff filed his amended complaint, he was incarcerated within NDOC, but subsequently filed a notice of change of address on West 48th Street in Los Angeles. (ECF No. 17.) Defendants served their motion on Plaintiff at that address. (ECF No. 21 at 11.) Plaintiff did not file a timely response. On August 26, 2021, Plaintiff filed a notice of change of address, indicating a new address at the North County Correctional Facility in Los Angeles. (ECF No. 26.) In an abundance of caution, the court ordered the Clerk to send a copy of Defendants' briefing to Plaintiff's new address and extended the time for Plaintiff to file a response to October 21, 2021. (ECF No. 27.) No response was filed.

1 events giving rise to this action took place while Plaintiff was housed at Ely State Prison (ESP).

2 (*Id.*)

3 The court screened Plaintiff's amended complaint and allowed him to proceed with
4 several Eighth Amendment conditions of confinement claims. First, Plaintiff was permitted to
5 proceed with a claim against Reubart based on allegations that Plaintiff informed Reubart the
6 prison showers were not being cleaned, and Reubart ignored Plaintiff. Subsequently, Plaintiff
7 was forced to take a shower in a stall that someone had defecated in. Second, Plaintiff was
8 allowed to proceed with a claim against Reubart, Gittere, Stubbs, Cruz, Butcher and Rowley,
9 based on allegations that: they made him walk through someone else's blood, they tracked that
10 blood in and out of Plaintiff's cell, they did not permit Plaintiff to shower for several days to
11 wash the blood off, they did not give Plaintiff any cleaning supplies to remove the blood from his
12 living space, and then they made Plaintiff clean up the blood with his clothing. (ECF No. 11.)

13 Defendant Rowley was subsequently dismissed without prejudice under Federal Rule of
14 Civil Procedure 4(m). (ECF No. 18.)

15 Defendants move for summary judgment, arguing that Plaintiff failed to exhaust his
16 administrative remedies before filing his complaint.

17 II. LEGAL STANDARD

18 The legal standard governing this motion is well settled: a party is entitled to summary
19 judgment when "the movant shows that there is no genuine issue as to any material fact and the
20 movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp.*
21 *v. Cartrett*, 477 U.S. 317, 330 (1986) (citing Fed. R. Civ. P. 56(c)). An issue is "genuine" if the
22 evidence would permit a reasonable jury to return a verdict for the nonmoving party. *Anderson v.*
23 *Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). A fact is "material" if it could affect the outcome

1 of the case. *Id.* at 248 (disputes over facts that might affect the outcome will preclude summary
 2 judgment, but factual disputes which are irrelevant or unnecessary are not considered). On the
 3 other hand, where reasonable minds could differ on the material facts at issue, summary
 4 judgment is not appropriate. *Anderson*, 477 U.S. at 250.

5 “The purpose of summary judgment is to avoid unnecessary trials when there is no
 6 dispute as to the facts before the court.” *Northwest Motorcycle Ass’n v. U.S. Dep’t of Agric.*, 18
 7 F.3d 1468, 1471 (9th Cir. 1994) (citation omitted); *see also Celotex*, 477 U.S. at 323-24 (purpose
 8 of summary judgment is “to isolate and dispose of factually unsupported claims”); *Anderson*, 477
 9 U.S. at 252 (purpose of summary judgment is to determine whether a case “is so one-sided that
 10 one party must prevail as a matter of law”). In considering a motion for summary judgment, all
 11 reasonable inferences are drawn in the light most favorable to the non-moving party. *In re*
 12 *Slatkin*, 525 F.3d 805, 810 (9th Cir. 2008) (citation omitted); *Kaiser Cement Corp. v. Fischbach*
 13 & *Moore Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986). That being said, “if the evidence of the
 14 nonmoving party “is not significantly probative, summary judgment may be granted.” *Anderson*,
 15 477 U.S. at 249-250 (citations omitted). The court’s function is not to weigh the evidence and
 16 determine the truth or to make credibility determinations. *Celotex*, 477 U.S. at 249, 255;
 17 *Anderson*, 477 U.S. at 249.

18 In deciding a motion for summary judgment, the court applies a burden-shifting analysis.
 19 “When the party moving for summary judgment would bear the burden of proof at trial, ‘it must
 20 come forward with evidence which would entitle it to a directed verdict if the evidence went
 21 uncontested at trial.’ … In such a case, the moving party has the initial burden of establishing
 22 the absence of a genuine [dispute] of fact on each issue material to its case.” *C.A.R. Transp.*
 23 *Brokerage Co. v. Darden Rest., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (internal citations

1 omitted). In contrast, when the nonmoving party bears the burden of proving the claim or
 2 defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate
 3 an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving
 4 party cannot establish an element essential to that party's case on which that party will have the
 5 burden of proof at trial. *See Celotex Corp. v. Cartrett*, 477 U.S. 317, 323-25 (1986).

6 If the moving party satisfies its initial burden, the burden shifts to the opposing party to
 7 establish that a genuine dispute exists as to a material fact. *See Matsushita Elec. Indus. Co. v.*
 8 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The opposing party need not establish a genuine
 9 dispute of material fact conclusively in its favor. It is sufficient that "the claimed factual dispute
 10 be shown to require a jury or judge to resolve the parties' differing versions of truth at trial."
 11 *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987)
 12 (quotation marks and citation omitted). The nonmoving party cannot avoid summary judgment
 13 by relying solely on conclusory allegations that are unsupported by factual data. *Matsushita*, 475
 14 U.S. at 587. Instead, the opposition must go beyond the assertions and allegations of the
 15 pleadings and set forth specific facts by producing competent evidence that shows a genuine
 16 dispute of material fact for trial. *Celotex*, 477 U.S. at 324.

17 III. DISCUSSION

18 The Prison Litigation Reform Act (PLRA) provides that "[n]o action shall be brought
 19 with respect to prison conditions under section 1983 of this title, or any other Federal law, by a
 20 prisoner confined in any jail, prison, or other correctional facility until such administrative
 21 remedies as are available are exhausted." 42 U.S.C. § 1997e(a). An inmate must exhaust his
 22 administrative remedies irrespective of the forms of relief sought and offered through
 23 administrative avenues. *Booth v. Churner*, 532 U.S. 731, 741 (2001).

1 "If undisputed evidence viewed in the light most favorable to the prisoner shows a failure
2 to exhaust, a defendant is entitled to summary judgment under Rule 56. If material facts are
3 disputed, summary judgment should be denied, and the district judge rather than a jury should
4 determine the facts [in a preliminary proceeding]." *Albino v. Baca*, 747 F.3d 1162, 1168, 1170-
5 71 (citations omitted).

6 Once a defendant shows that the plaintiff did not exhaust available administrative
7 remedies, the burden shifts to the plaintiff "to come forward with evidence showing that there is
8 something in his particular case that made the existing and generally available administrative
9 remedies effectively unavailable to him." *Id.* at 1172 (citing *Hilao v. Estate of Marcos*, 103 F.3d
10 767, 778 n. 5 (9th Cir. 1996)); *Draper v. Rosario*, 836 F.3d 1072, 1080 (9th Cir. 2016) (inmate
11 plaintiff did not meet his burden when he failed to identify any actions prison staff took that
12 impeded his ability to exhaust his administrative remedies, or otherwise explain why he failed to
13 comply with the administrative remedies process)). The ultimate burden of proof, however,
14 remains with the defendant. *Id.*

15 An inmate within NDOC exhausts administrative remedies by utilizing NDOC's
16 grievance process, which is governed by Administrative Regulation (AR) 740. AR 740 requires
17 an inmate to proceed through three levels to complete the grievance process: informal, first, and
18 second levels. (ECF Nos. 21-2, 21-3, 21-4.) An inmate must file an informal level grievance
19 within six months if the issue involves a civil rights claim. (*Id.*)

20 Plaintiff's inmate grievance history reveals that Plaintiff did not file a grievance about the
21 alleged unsanitary conditions in the shower facilities or related to the blood issues raised in his
22 complaint. (ECF No. 21-1.) Therefore, Defendants are entitled to summary judgment due to
23 Plaintiff's failure to exhaust his administrative remedies.

IV. RECOMMENDATION

2 IT IS HEREBY RECOMMENDED that the District Judge enter an order **GRANTING**
3 Defendants' motion for summary judgment (ECF No. 21).

4 The parties should be aware of the following:

5 1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to
6 this Report and Recommendation within fourteen days of being served with a copy of the Report
7 and Recommendation. These objections should be titled “Objections to Magistrate Judge’s
8 Report and Recommendation” and should be accompanied by points and authorities for
9 consideration by the district judge.

10 2. That this Report and Recommendation is not an appealable order and that any notice of
11 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed
12 until entry of judgment by the district court.

14 | Dated: October 25, 2021

William G. Cobb
United States Magistrate Judge